IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

J.H., by and through his next friend, Flo Messier; L.C., by and through her next friend, Flo Messier; R.J.A., by and through his next friend, J.A.; Jane Doe, by and through her next friend, Julia Dekovich; S.S., by and through his next friend, Marion Damick; G.C., by and through his next friend, Luna Pattela; R.M., by and through his next friend, Flo Messier; P.S., by and through his next friend, M.A.S.; T.S., by and through his next friend, Emily McNally; M.S., by and through his next friend, Emily McNally; and all others similarly situated, **Plaintiffs** **v.** **Teresa D. Miller in her official capacity as Secretary of the Pennsylvania Department of Human Services; Jessica Keith in her official capacity as the Chief Executive Officer of Norristown State Hospital; Stacey Keilman in her official capacity as the Acting Chief Executive Officer of Torrance State Hospital,** **Defendants**	**Civil Action No. 1:15-cv-02057-SHR** **Judge Sylvia H. Rambo**

BRIEF IN OPPOSITION TO PLAINTIFFS' SECOND RENEWED AND AMENDED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

From the outset of this litigation, the Department of Human Services ("Department") has shown its commitment, with demonstrable results, to constitutional wait times for individuals declared incompetent to stand trial on criminal charges and who need competency restoration treatment. Since January 2016, when this Court approved the First Settlement Agreement that the parties negotiated, the Department has infused unprecedented financial and other resources into the forensic system in Pennsylvania. The Department has opened 100 new inpatient and 75 new institutional "step-down" beds. It has invested close to $64 million to develop 463 new community treatment and supported housing slots, more than 370 of which are in operation, with the remainder under active development.

The actions that the Department has taken to transform the forensic system have resulted in dramatic reductions in the wait lists since this lawsuit was filed. In November 2015, more than 200 persons were waiting to be admitted to Norristown State Hospital ("NSH") or Torrance State Hospital ("TSH"), and the average wait time for NSH was 114 days and for TSH was 30 days from the date the hospitals received the full referral. As of March 29, 2018, 56 persons were waiting to be admitted to NSH an average of 44 days from the date of the court commitment order, and 24 individuals were waiting for admission to TSH an

average of 29.5 days from the date of the court order. From January 2016 to March 29, 2019, the hospitals admitted 1,116 patients to the forensic units and discharged 1,058 patients from the forensic units. An additional 911 persons were removed from the wait lists before being admitted to the forensic units, after it was determined that they did not need an inpatient level of care.

From the outset of this litigation, the parties have agreed that the delays in admission to state hospitals for competency restoration treatment are unacceptable. Recognizing that the forensic system needed a major overhaul, the parties have entered into two settlement agreements and were in the process of negotiating a third when Plaintiffs renewed their request for preliminary injunctive relief.[1] Notwithstanding the commitment reflected in the Department's extensive actions and the results of those actions, Plaintiffs have chosen to disregard the systemic issues identified by their independent consultant and ask this Court to impose a remedy that will not resolve those systemic issues.

The Department agrees that more work is needed to reduce the wait times to constitutionally acceptable levels. Plaintiffs' requested relief is not, however, required by the Constitution and ignores the practicable impediments that would make the requested remedy impossible to achieve. Their motion should be denied.

[1] The parties have continued their negotiations since Plaintiffs filed their motion and remain hopeful that they will reach agreement to resolve the motion.

COUNTER-STATEMENT OF THE CASE[2]

The Forensic Mental Health System in Pennsylvania

Admission to a state psychiatric hospital begins with a court order committing an individual for competency restoration treatment. The county courts of common pleas have the authority to declare an individual incompetent to stand trial, commit the individual to the Department for restoration treatment, and order transfer of the individual to and from the state hospitals. Some counties utilize their own evaluators to conduct a court-ordered competency evaluation, whereas others utilize the Department's contracted evaluators. When the evaluation is completed with a clinical finding of incompetent to stand trial, the court issues an order declaring that the individual is incompetent to stand trial and a subsequent order for competency restoration services.

After the commitment order is issued, the process to transfer the individual to the state's forensic units at NSH and TSH begins. Multiple documents are needed before someone can be admitted to the hospitals: 1) court order; 2) completed referral form; 3) affidavit of probable cause, criminal complaint, or arrest record; 4) all prior evaluations; 5) assessment screens; 6) medication administration record; 7) progress notes; and 8) current treatment plan. See

[2] The facts in the Introduction and in the Counter-Statement of the Case are supported by the Declaration of Philip E. Mader, attached hereto as Exhibit "A."

Bulletin OMHSAS-16-10, attached hereto as Exhibit "B," Attachment 5. Each of these documents is necessary for the Department to provide a safe and therapeutic environment for both the individual and staff.

After the hospital receives all the information, it contacts the county to schedule transfer of the individual to the designated forensic unit. The respective county's sheriff transports the individual to the designated facility.

After the Department's clinicians determine that a person is clinically ready for disposition, either because he or she has regained competency, or because he or she is unlikely to regain competency, the hospital formally notifies the county court. Depending on the response to the clinician's report, the court may re-commit the individual for additional restoration services, may issue an order to transfer the individual back for disposition of the criminal charges, or may order transfer or discharge to an alternate setting. If the person is to return to the county jail, the county's sheriff is responsible for transporting the individual.

The Department's Actions to Transform the Forensic System

Since the First Settlement Agreement, the Department continues to engage the system statewide and has materially complied with its agreements with Plaintiffs. In accordance with the First Settlement Agreement, NSH and TSH assessed individuals on the wait lists, and in the forensic and civil units. These assessments addressed the clinical and legal obstacles for each individual. The

Department also funded 120 new community treatment slots to be created in the counties to expand treatment opportunities and provided funding for 100 supported housing slots in Philadelphia to assist individuals to move through the continuum of care.

Although the First Settlement Agreement required the Department to fund 120 new community slots plus the 100 supported housing slots, the Department continued to fund and work on adding community treatment slots into the system. The Department continued to receive and approve county proposals for the creation of slots, beyond those required by the First Settlement Agreement. The Department also collaborated with Plaintiffs' expert, Joel Dvoskin, and created an action plan that outlined steps to reduce the wait list and wait times.

In addition to completing assessments and funding new community treatment slots, the Department made operational changes and engaged the forensic system on a local level. The Department revised its bulletin, OMHSAS-16-10, updating the procedures pertaining to referrals, admissions, transfers, and level of care. See Exhibit "B." The bulletin clarified the information to be provided for each individual referred to the forensic units and specified the information needed for an expedited commitment. The Department also established county review teams in both Allegheny and Philadelphia counties. These teams consist of members from the county prosecutor's office, public defender, county mental

health administrators, and staff from NSH or TSH. The teams meet to discuss the status of the individuals in the forensic units, as well as individuals on the wait lists. The goal is to identify individuals who can be diverted from admission to or be discharged from the forensic units at NSH or TSH. The Department meets with county judges to discuss other placement options for those individuals who could be served in less restrictive settings.

Despite the extensive actions undertaken by the Department during 2016-2017, the wait lists and the wait times remained high. Specifically, the wait list grew from 206 people awaiting treatment on January 29, 2016, to 256 individuals awaiting treatment on May 26, 2017, and the average wait times for persons on the wait lists were 145 days at NSH and 50 days at TSH, for a combined average wait time of 142 days.

Because of the lack of progress in reducing the wait lists and wait times despite the Department's unprecedented investment of financial and personnel resources, Plaintiffs filed a renewed and amended motion for preliminary injunction on May 11, 2017. See ECF 40. Soon thereafter, Plaintiffs and the Department entered into a Second Settlement Agreement, which this Court approved. See ECF 59. Once again, the Department agreed to take actions that the parties believed would reduce wait times to constitutional levels. Id.

The Department has created three step-down units with a total of 75 beds on the NSH campus, which added a less-restrictive treatment setting to prepare patients for an eventual move into the community. The first step-down unit with 25 beds opened in September 2016, and the second unit with an additional 25 beds opened in February 2017. The remaining step-down beds were converted from civil beds as those beds became available. The Department continues to convert civil beds to this use as beds become unoccupied and available.

Prior to entering into the Second Settlement Agreement, the Department engaged in a Six Sigma process to identify inefficiencies within the system, and streamline the process for commitments, diversions, and discharges at NSH. The outcomes, while statewide, focused on Philadelphia in light of the monthly number of commitments referred from that county. Philadelphia and Delaware counties participated and provided input in how system functionality could be improved, such as template language for court orders that all counties would use.

Even though the Department completed the Six Sigma process, the Department agreed to engage an independent consultant, Public Research Associates ("PRA"), recommended by Plaintiffs. The Department welcomed input from the independent consultant, since the criteria it would analyze extended beyond Defendants' locus of control. PRA ultimately identified eleven Recommendations. See Exhibit "A" to Brief in Support of Plaintiffs' Second

Renewed and Amended Motion for Preliminary Injunction ("PRA Report"). Only one of those recommendations identified a requirement that the Department create more institutional forensic beds, which the Department had already planned to do at the time PRA issued its report. Id. at 13.

The remaining PRA Recommendations identified issues within the system at the local level. PRA proposed to address several issues within the forensic system ranging from creation of community-based outpatient competency restoration programs, to reviews of individuals in treatment at NSH or TSH for one year, to creation of community treatment opportunities for individuals unlikely to regain competency. Id. at 4, 7. The Department accepted each of the Recommendations.

The Department's actions began to produce positive results: both the number of individuals on the wait lists and the combined wait times for individuals on the wait lists decreased. Specifically, on June 1, 2018, 183 individuals were waiting for admission to the hospitals an average of 94 days. Of those 183 individuals, 129 individuals were waiting for admission to NSH for an average of 105 days and 54 individuals were waiting for admission to TSH for an average of 67 days.

In March 2018, Plaintiffs acknowledged the positive developments but expressed concern that the progress may not continue. See Email from Witold Walczak, Exhibit "C" to Brief in Support of Plaintiffs' Second Renewed and Amended Motion for Preliminary Injunction. Counsel requested additional

commitments from the Department to reduce wait times. Id. In response, the parties engaged in discussions to develop additional commitments from the Department to reduce wait times to a constitutional level. The Department committed to take the following actions:

- By March 31, 2019, make available resources to fund and operationalize at least 125 new treatment slots for class members in addition to those originally specified in the First Agreement and Second Agreement;
- By March 31, 2019, reduce the number of class members on the joint NSH and TSH wait lists to fewer than 90 individuals;
- By March 31, 2019, reduce wait times to no longer than 90 days for any class member on the wait list for NSH, and no longer than 60 days for any class member on the wait list for TSH; and
- By September 30, 2019, reduce wait times for every class member on the wait lists to no longer than 21 days.

Over the last few months, the Department has achieved significant and consistent reductions in the number of individuals on the wait lists and the wait times those individuals are experiencing. Specifically, from June 1, 2018, to March 29, 2019, the number of individuals on the wait list decreased from 183 to 76, and the average number of days that individuals were on the wait list from the date of court order was 44 days for NSH and 29.5 days for TSH, for a combined average wait time of 39.7 days. The average wait times from the date the hospitals received the county referrals to the admission date was 30 days for NSH and 14.5 days for TSH, for a combined average wait time of close to 25 days. The

Department remains committed to reduce wait times for every individual on the wait list to 21 days by September 30, 2019, and is undertaking actions that are commensurate with that commitment.

ARGUMENT

PLAINTIFFS HAVE NOT MET THE HEIGHTENED BURDEN NECESSARY TO PREVAIL ON THEIR MOTION.

A preliminary injunction is an extraordinary remedy, which should not be granted lightly. See, e.g., Am. Freedom Defense Initiative v. Southeastern Pa. Transp. Auth., 92 F. Supp. 3d 314, 322 (E.D. Pa. 2015) (citing Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989)). A preliminary injunction should be granted only when it can be restricted to specific, limited circumstances. Am. Freedom Defense Initiative, 92 F. Supp. 3d at 322 (citing AT&T v. Winback Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994)).

To succeed on their claim for injunctive relief, Plaintiffs must demonstrate that they have a reasonable probability of success on the merits of their claim; that they will suffer irreparable harm if the court denies their motion; that no other party will suffer serious harm if the court issues the injunction; and that preliminary relief will serve the public interest. See, e.g., Brian B. v. Dep't of Educ., 230 F.3d 582, 585 (3d Cir. 2000); Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994); S.I. Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1985).

Plaintiffs carry an even heavier burden here because they request relief that extends beyond merely preserving the status quo. Instead, Plaintiffs request this Court to order relief that requires admission to the forensic units of NSH and TSH within seven days of the court committing the individual to the hospital. "[W]hen mandatory injunctive relief is sought, 'the burden on the moving party is particularly heavy.'" Trinity Indus., Inc. v. Chicago Bridge & Iron Co., 735 F.3d 131, 139 (3d Cir. 2013) (quoting Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)). "Indeed, the moving party's 'right to relief must be indisputably clear.'" Id. (quoting Communist Party v. Whitcomb, 409 U.S. 1235, 1235 (1972)). Mandatory injunctive relief is an extraordinary remedy that is granted only sparingly by the courts. Id. (citing Communist Party, 409 U.S. at 1235). Courts should weigh the possible harm to other interested parties when reviewing a plaintiff's request for mandatory relief. Punnett, 621 F.2d at 587–88. The moving party's "right to relief must be indisputably clear" to grant the mandatory relief. Trinity Indus., 735 F.3d at 139 (citing Communist Party, 409 U.S. at 1235).

A. Plaintiffs Have Not Satisfied All Four Criteria Necessary for a Preliminary Injunction.

Before a court issues a preliminary injunction for mandatory relief, it is particularly appropriate to consider the possible harm to the other parties, not just the moving party. See Punnett, 621 F.2d at 587-88. The Department will be subject to harm, and preliminary relief will not serve the public interest because the

issuance of a preliminary injunction with Plaintiffs' requested relief will subject the Department to sanctions for actions or inactions that are outside its control.

When the First Settlement Agreement did not alleviate the forensic wait list issues, the Department accepted Plaintiffs' recommendation to engage PRA to conduct a system-wide evaluation of the forensic mental health system and issue a report. See ECF No. 59 at ¶ 1. The PRA Report identified county-level barriers outside the Department's control that significantly contribute to the forensic wait list issues. See PRA Report at 13. The PRA Report identified that out of a sample size of 97 individuals on the wait lists, 32% were competent to stand trial, 32% appeared incompetent to stand trial but could safely function in the community, and the final 36% required hospital-level care. Id. at 6. Accordingly, 64% of the individuals in the sample did not need to be on the wait lists. In connection with this finding, PRA also observed a lack of county-based options. Id. at 7–8.

PRA also noted that one-quarter of the beds then in use at NSH were occupied by individuals that hospital clinicians determined were competent. Id. at 4. After the hospitals notify the specific county that an individual is competent to stand trial, the county plans and provides the transportation back to the jail. Although the hospitals and the county at times disagree about the competency of the individual, sometimes there is simply a delay in returning individual to jail for disposition of the criminal charges. Id. at 4. This adds time to the length of stay

and stymies efforts to admit individuals awaiting treatment. Id. at 4. PRA's analysis demonstrates that issues with discharging patients back to their counties is a dilemma outside of the Department's control. Id. at 13.

PRA's identification of systemic issues illustrates that only one-third of individuals on the wait lists at the time required inpatient treatment, with one-quarter of the population in the forensic units competent to stand trial but not returned for disposition of their charges. Id. at 4. In light of these circumstances, a preliminary injunction would result in undue harm to the Department because it would subject the Department to sanctions for actions and inactions that even Plaintiffs' recommended expert acknowledged are county level-issues not within the Department's control.

B. Plaintiffs' Requested Relief Is Not Equitable.

Plaintiffs request that this Court grant a preliminary injunction and order the Department to transfer all class members to a non-punitive, mental health setting for restoration treatment within seven days of the common pleas court's commitment order. See Brief in Support of Plaintiffs' Second Renewed and Amended Motion for Preliminary Injunction at 18. The requested relief is not equitable, realistic, or reasonable due to practical impediments and delays for good cause outside the Department's control. When seeking a preliminary injunction,

one of the requirements that a plaintiff must establish is that the balance of equities tips in his favor. Winter v. Natural Res. Defense Council, 555 U.S. 7, 20 (2008).

To support their demand that seven days is the only constitutionally acceptable maximum amount of time that class members should wait for admission to the state hospitals, Plaintiffs rely on only two cases that established the seven-day requirement. Plaintiffs point to the decision in Trueblood v. Wash. State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010 (W.D. Wash. 2015), to support their position, but the Ninth Circuit recognized that issues outside Washington's control can legitimately create delays. Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1045 (9th Cir. 2016) ("practical impediments, such as intervening weekends or the time necessary to obtain documents, can eat up the time period" for evaluations within seven days). The Ninth Circuit vacated the district court's decision to require evaluations within seven days and remanded the matter back for consideration of the practical impediments that were outside the state's control. On remand, the district court recognized, among other things, delays in receiving all required documentation, delays caused by waiting for intoxicants to clear an individual's system, and delays caused by an evaluator's

need for additional records. Trueblood v. Wash. Dep't of Soc. & Health Servs., No. C14-1178-MJP, 2016 WL 4268933 (W.D. Wash. Aug. 15, 2016).[3]

Although the Ninth Circuit and the district court in Trueblood were addressing the practical impediments to conducting competency evaluations within seven days, the same rationale and reasons apply to the reasonable delays for admission to NSH and TSH. In fact, the impediments to the admission of patients to the hospitals are more substantial than impediments to evaluations because the admission of patients entails taking physical custody of patients and ensuring their physical and mental well-being.

Specifically, the individuals ordered to NSH and TSH are in the physical custody of the counties. Exhibit "A" at ¶ 57. Thus, the county must provide the hospital with a referral packet that includes the medical clearance to admit the individual for treatment. Id. at ¶¶ 11, 58. NSH and TSH also need a valid court order to accept custody, as well as a completed referral packet. Id. at ¶ 11. The referral packet contains all of the documentation necessary for the hospital to treat an individual as well as assess any danger that staff should be aware of when

[3] Prior to the Ninth Circuit's decision, the district court had modified the initial permanent injunction to allow for a good cause exception to the timeframe for admission of class members ordered to receive competency services in state hospitals. Trueblood, 2015 WL 13664033 at *2 (W.D. Wa. May 6, 2015). The good cause exception allowed for delays in admission when the medical condition of the individual did not allow for transport to the facility until the individual was medically cleared. Id.

caring for the individual. Id. at ¶¶ 12-13. NSH and TSH staff need to know that an individual is medically cleared to come for restoration treatment. Id. at ¶¶ 13, 58. Many times, NSH and TSH experience a delay in the receipt of pertinent information, which delays the admission. Id. at ¶ 59.

Delays are also associated with discharging patients determined competent to stand trial. At times, the hospital and a county disagree about the competency of an individual, which requires discussion and some additional collaboration. Id. at ¶ 60. Other times, counties are delayed in transporting individuals from the forensic units back to jail after an individual has been assessed to be competent to stand trial. Id. at ¶ 63. Such a delay adds time to the patient's length of stay in the hospital, impeding efforts to make beds available for individuals awaiting treatment. Id. at ¶ 64. These types of issues create delays in admitting individuals to the forensic units similar to the delays recognized by the district court in Trueblood.

Plaintiffs also rely on Or. Advocacy Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003), as the other case that established a seven-day admission requirement. That case is distinguishable, however, because the Ninth Circuit there noted that the "district court set the time limit at seven days based in part on the Oregon legislature's choice of that time limit in a now-superseded version of the relevant state statute." Id. at n.13. The Court's observation underscores why Plaintiffs'

overstate their reliance on these two cases to persuade this Court to hold that seven days is the maximum allowable wait time that is constitutionally acceptable.

Seven days is by no means the litmus test for maximum allowable wait times across the nation. The District Court for the Eastern District of Louisiana established a 21-day timeframe for transferring individuals into competency restoration settings. See Advocacy Ctr. for the Elderly & Disabled v. La. Dep't of Health & Hosps., 731 F. Supp. 2d 603, 627 (E.D. La. 2010). This variance illustrates that maximum allowable wait times may be based on consideration of the specific circumstances each state faces in providing competency restoration.

A wait of 21 days for restoration treatment in Pennsylvania's state hospitals comports with constitutional requirements because practical impediments outside of the Department's control account for at least a portion of the time an individual waits to be admitted. Accordingly, the seven-day timeframe demanded by Plaintiffs is not equitable.

CONCLUSION

For the reasons set forth above, the Defendants request that this Court deny Plaintiffs' requested preliminary injunctive relief that class members be admitted to the state hospital forensic units within seven days of the court commitment.

Respectfully Submitted,

Dated: April 23, 2019

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LOCAL RULE 7.8(b)(2) CERTIFICATION

I certify under penalty of perjury that the Brief in Opposition to Plaintiffs' Second Renewed and Amended Motion for Preliminary Injunction complies with Local Rule 7.8(b)(2) because, based on the word processing system used to prepare the Brief, Word 2016, the Brief contains 4,058 words (excluding the Table of Contents and Table of Authorities).

Date: April 23, 2019

/s/ *Matthew J. McLees*
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IN THE UNITED STATES DISTRICT COURT
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J.H., by and through his next friend, Flo Messier; L.C., et al., **Plaintiffs** **v.** **Teresa D. Miller in her official capacity as Secretary of the Pennsylvania Department of Human Services, et al.,** **Defendant**	**Civil Action No. 1:15-cv-02057-SHR** **Judge Sylvia H. Rambo**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 23rd day of April, 2019, served a copy of the foregoing Brief in Opposition to Plaintiffs' Second Renewed and Amended Motion for Preliminary Injunction, via electronic mail, on Plaintiffs' counsel:

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